



2001

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Recommended Citation

K.K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 J. APP. PRAC. & PROCESS 397 (2001).

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ARE SOME WORDS BETTER LEFT UNPUBLISHED?: PRECEDENT AND THE ROLE OF UNPUBLISHED DECISIONS

K.K. DuVivier*

INTRODUCTION

In the summer of 2000, a three-judge panel of the Eighth Circuit issued a decision that, if followed nationwide, could cripple our court system. In that decision, *Anastasoff v. United States*,¹ the Eighth Circuit determined that the portion of its Rule 28A(i) providing that unpublished opinions could be cited but were not binding as precedent, was unconstitutional.²

The selective designation of some opinions as unpublished is a fairly recent phenomenon for courts.³ However, in the two

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1. *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc). Eighth Circuit Judge Richard S. Arnold authored the majority opinion and was joined in that opinion by Paul A. Magnuson, Chief Judge of the United States District Court for the District of Minnesota, sitting by designation. Eighth Circuit Judge Gerald Heaney filed a concurring opinion. *Id.* at 905.

2. *Id.*

3. In the early 1970s, appellate courts began to consider reducing the number of published opinions to help manage their growing caseloads. Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded*

decades since its origin, the practice has grown.⁴ Now, almost every circuit court, and many of the state intermediate level appellate courts across the country, use unpublished opinions extensively to handle heavy caseloads efficiently. If all cases were treated equally, both in terms of the time to prepare them and in terms of their weight as precedent, the impact could be catastrophic.

Initially, it is important to clarify that the label “unpublished opinion,” as used by some courts, is a misnomer. These opinions may be published, often on a web site or on electronic databases such as Westlaw or LEXIS. Some “unpublished opinions” also are available in bound volumes of a reporter and have a citation. Further, with the advent of electronic databases, all opinions—both “published” and “unpublished”—soon may be equally available to practitioners. Therefore, the main distinction between a published and unpublished opinion is that unpublished opinions have not been selected for official publication by the courts.

Although the existing nomenclature creates confusion, the Eighth Circuit rule and others like it continue to provide the best solution for how to deal effectively with heavy caseloads. First, because electronic databases can make unpublished opinions readily available, there is no need to see them as creating a body of “secret” law. Second, although the courts may spend less time on the unpublished opinions, if my experience as the Reporter of Decisions for the Colorado Court of Appeals is representative, the scrutiny and analysis unpublished opinions undergo is sufficient to satisfy the judicial obligations imposed by the Constitution. Finally, regardless of whether an opinion is actually published in a book, it is helpful for courts to distinguish between those opinions that are potentially more valuable for the analysis of future cases (i.e. “published

Appellate Courts Justify the Means of Secrecy? 50 S.C. L. Rev. 235, 236, 241 (1998) (citing *The 1973 Report of the Advisory Council for Appellate Justice*, statement of Professor Robert J. Van Der Velde to the Commission on Structural Alternatives for the Federal Courts of Appeals <<http://app.comm.uscourts.gov/hearings/submitted/VANDERVE.htm>>).

4. The number of unpublished opinions rose steadily through the mid 1970s, “leveled off in the 1980s,” and now, “a majority of all final decisions by [the federal] courts of appeals are unpublished.” Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 Ohio St. L.J. 177, 188 (1999).

decisions”) and others that are more routine (i.e. “unpublished decisions”). In this way, a subsequent court can take the prior court’s determination of the significance of its decision into consideration when performing its duty “to determine the law.”⁵ Using the traditional understanding of precedent to mean simply that a line of prior cases should furnish a basis for determining later cases, a case should not be arbitrarily controlled by one prior decision simply because that decision came before it.

First, this article will provide background on the use of unpublished decisions by different levels of the courts. Second, it will explore the three ways unpublished opinions are treated by the courts. Finally, it will respond to three pragmatic issues relating to unpublished decisions that were raised by *Anastasoff*: (1) the availability of these decisions, (2) the quality of the reasoning in unpublished decisions, and (3) the treatment of unpublished opinions as precedent.

I. THE COURTS AND PUBLICATION OF THEIR OPINIONS

There is wide variation among the roles of different courts within the federal and state hierarchies.⁶ These roles, and the resulting caseloads, impact whether a particular decision will be published. In some courts, all of the opinions are published; in others, virtually none. After discussing the role of unpublished decisions in various courts, this article will focus primarily on unpublished decisions in the intermediate appellate courts because these are the courts that most often have unpublished decisions by choice.

5. *Anastasoff*, 223 F.3d at 901 (quoting William Blackstone, *Commentaries* vol. 3, * 25). In *Anastasoff*, Judge Arnold interprets the obligations of a judge under Article III of the U.S. Constitution. See generally *id.* at 899-904.

6. Article III of the United States Constitution vests “[t]he Judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. Const. art. III, § 1. This language has resulted in a hierarchy of three levels of federal courts: the district courts, the appellate courts, and the United States Supreme Court. Similarly, most states have established a three-level hierarchy of district, appellate, and supreme courts roughly parallel to the hierarchy in the federal courts.

A. District Courts

The district courts represent the front line for litigants entering the judicial system. As a general rule, the role of the district courts is to establish the relevant facts and law of a case in making the record. By far, the district courts handle the largest caseload. Nationwide, over 260,000 civil cases were filed in the federal district courts during fiscal 1999.⁷ The federal district courts have a West reporter specifically dedicated to their opinions—the *Federal Supplement*. Yet, each year only a few of the federal district court decisions are designated for publication by each district court judge.⁸

The state trial courts play a parallel role to that of the federal district courts. They are the initial point at which parties can present facts and make a legal record. The state district courts similarly handle the largest number of cases in the state systems. For example, approximately 160,000 cases were filed at the district court level in Colorado in 2000.⁹ However, unlike federal district court opinions, almost none of state district court opinions are published.¹⁰

B. Intermediate Appellate Courts

In most jurisdictions, litigants who are unhappy with the outcome of their cases in the district courts are entitled to an appeal of right to an intermediate appellate court. The primary

7. Administrative Office of the U.S. Courts, *Statistical Tables for the Federal Judiciary: June 30, 2000*.

8. Each judge decides what to submit for publication and posts it on the court's web site. The publishers look at the web site to determine what they want to publish. Last year in the federal district court in Denver, one judge published 36 opinions and another published only one. On average, the federal district judges each choose approximately four to six opinions per year to be published. Interview with Steve Ehrlich, Deputy Clerk of the U.S. Dist. Ct. for the Dist. of Colo. (Nov. 1, 2000).

9. In 2000, there were 159,596 cases (criminal and civil, excluding water cases) filed in Colorado's district courts, and those same courts terminated 171,562 cases in 2000. Colo. Jud. Branch FY 2000 Annual Rpt. at 27. <<http://www.courts.state.co.us/annual2000/table11.pdf>> (accessed May 11, 2001).

10. Many of the decisions of district court judges are made orally, and only extraordinary district court opinions are published. There are three places these opinions are published: (1) in the standard periodicals in Colorado; (2) in the monthly state bar journal, *The Colorado Lawyer*; or (3) in the weekly judicial newspaper, *The Colorado Journal*.

role of these courts is error correction: Litigants have the right to have an appellate court determine whether the district court judge made a legally significant mistake.

Because every litigant has this right to appeal, the workload of these intermediate appellate courts can be staggering. For example, the Ninth Circuit issued over 4,500 opinions in fiscal 1999, and the Fifth Circuit issued almost 4,000.¹¹ To handle this heavy workload, several of the circuit courts designate only a small portion of the decisions in these cases for publication. The numbers vary from 46.1% published in the First Circuit to only 10.3% published in the Fourth Circuit.¹² Opinions that are selected for publication are submitted to West Publishing for placement in the *Federal Reporter*. In addition, as noted above, both those opinions that are designated for publication and those that are not are available on the federal courts' web site and also are frequently available on the LEXIS and Westlaw electronic databases.

Similarly, many state appellate courts designate the majority of their opinions as "not selected for official publication."¹³ Despite a court's determination that an opinion does not warrant publication in the official reporters, publishers often will make these cases available to practitioners. The publishers post the full text on their databases or publish a hard copy of the case in a case reporter or periodical.¹⁴ These publishers generally print a caveat on the first page of the case warning that the case was not selected for official publication.¹⁵

11. The Ninth Circuit issued 4,507 opinions and the Fifth Circuit issued 3,957 opinions. Admin. Off. of the U.S. Cts., *Appeals Tables for the Twelve-Month Period Ending June 30, 2000*, Table S-3.

12. *Id.*

13. The court allows motions requesting that an unpublished opinion be published. Colo. App. R. 35. The motion is then circulated, along with a copy of the opinion, to all the court of appeals judges, who then vote whether to publish the opinion.

14. Westlaw and LEXIS representatives said there is no systematic way of choosing which unpublished opinions will be reported in their services. Instead, when a subscriber asks about a particular opinion, then they acquire it from the clerk of the court and post it. Interview with Dana Weidemann, Academic Account Manager, West Group (Oct. 30, 2000).

15. See e.g. 3d Cir. I.O.P 5.3 (2000) ("An opinion that is designated by the court as unreported shall state 'unreported, not precedential' on the face of the opinion.").

C. Supreme Courts

While many intermediate court judges see their role as principally error correction, the role of supreme court judges is primarily to define the law. The supreme courts can spend additional time on their opinions because appeal to the United States Supreme Court and to the majority of state supreme courts is not by right, but by certiorari, which is rarely granted. For example, for the twelve-month period ending September 30, 1999, the U.S. Supreme Court denied 97% of the petitions for certiorari filed to the Court and granted only 3%.¹⁶ Certiorari denials by state courts are not as frequent as for the United States Supreme Court, but petitions still are denied in the majority of cases.¹⁷

The United States Supreme Court issued only ninety-four opinions in 1999.¹⁸ This represents slightly more than ten opinions per justice. Similarly, the caseload of a state supreme court justice is significantly lighter than the caseload of a state appellate court judge. For example, in Colorado, each supreme court justice issued approximately sixteen opinions in 2000.¹⁹ In contrast, each judge on the Colorado Court of Appeals issued approximately 108 opinions.²⁰ Because of their status as law-defining cases, all United States Supreme Courts opinions are published. Similarly, virtually all state supreme court opinions are published.

16. Evan P. Schultz, *Gone Hunting, Judge Richard Arnold of the 8th Circuit has Taken Aim at Unpublished Opinions, but Missed His Mark*, 78 Leg. Times (Sept. 11, 2000) (4,977 petitions denied and 137 granted).

17. For fiscal 2000, 1,617 cases were filed in the Colorado Supreme Court, and during the same time period, only 111 written opinions were announced. This indicates that less than 7% of the cases are given the written opinion treatment. Even this percentage probably is overstated because some of these written opinions may have been in ballot title reviews, water cases, and attorney disciplinary proceedings. Colo. Jud. Branch, *FY 2000 Annual Report* at 7-9 <<http://www.courts.state.co.us/annualrpt/annual2000/table1/pdf>> (accessed May 11, 2001).

18. *Statistics for the Supreme Court's October Term 1999*, 69 U.S.L.W. 3076 (BNA 2000).

19. Colo. Jud. Branch, *FY 2000 Annual Report* at 9 <<http://www.courts.state.co.us/annualrpt/annual2000/table5.pdf>> (accessed May 11, 2001).

20. Colo. Jud. Branch, *FY 2000 Annual Report* at 18 <<http://www.courts.state.co.us/annualrpt/annual2000/table10.pdf>> (accessed May 11, 2001).

II. TREATMENT OF UNPUBLISHED OPINIONS

There are three options that courts can exercise with respect to unpublished opinions.²¹ First, some courts completely prohibit the citation of unpublished opinions. Second, other courts permit the citation of unpublished decisions, but will consider them only as persuasive, not binding authority. Finally, the position proposed by *Anastasoff* would not only permit the parties to cite unpublished decisions freely but also require the issuing courts to treat those decisions as controlling precedent.

A. Prohibiting Citation To Unpublished Decisions

At one time, the majority of federal circuit courts barred entirely the citation of unpublished rulings.²² Although it is now a minority position in the circuit courts, the no-citation rule is still widely used.²³ Some state courts also prohibit citation of unpublished decisions.²⁴ Although many of the rules that prohibit citation do not address the status of the unpublished decisions, the impact of prohibiting citation is equivalent to denying a case precedential status.²⁵ If a case may not be discussed, then it is effectively unavailable for the court's consideration.

This is consistent with the criteria used by courts to determine which cases are to be published. The language in the majority of these rules creates a presumption against

21. Some might consider a denial of certiorari as comparable to issuing an unpublished decision. Schultz, *supra* n. 16, at 78. Although a denial of certiorari terminates a lawsuit and has the effect of a summary affirmance, such decisions are not recognized as establishing precedence.

22. *Re Rules of the U.S. Ct. of App. for the Tenth Cir., Adopted Nov. 18, 1986*, 955 F.2d 36, 38 n. 4 (10th Cir. 1992) (Holloway, C.J., with Barrett & Baldock, JJ., dissenting).

23. See 1st Cir. R. 36 (2000); 2d Cir. R. 0.23 (2000); 7th Cir. R. 53(e) (2000); 9th Cir. R. 36-3 (2000).

24. For example, the Colorado Court of Appeals has forbidden citation to unpublished decisions (with two exceptions) since 1994. *Policy of the Colorado Court of Appeals Concerning Citation of Unpublished Opinions*, 23 Colo. Law. 1548 (1994).

25. For example, the Colorado rule states that "[t]hose opinions selected for official publication shall be followed as precedent by the trial judges of the state of Colorado." Colo. App. R. 35(f) (Bradford Publg. Co. 2000). Although this rule does not state that unpublished opinions may not be used as precedent, under the doctrine of *expressio unius alterius*, the court seems to intend to use only published opinions for precedent.

publication.²⁶ Furthermore, the criteria set out attempt to define the precedential quality of those cases chosen for publication by defining their impact on subsequent cases. For example, the Fourth Circuit rule states as follows:

Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or

It involves a legal issue of continuing public interest; or

It criticizes existing law; or

It contains a historical review of a legal rule that is not duplicative; or

It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.²⁷

Thus the courts, in choosing certain cases for publication and passing over others, attempt to establish some cases as precedent and deny precedential status to others.

B. Allowing Unpublished Decisions to be Cited and Used as Persuasive Authority

The majority of federal circuit courts now have a rule that is comparable to the Eighth Circuit's rule addressed in the *Anastasoff* case.²⁸ Most of these rules expressly permit citation to unpublished decisions, but only as persuasive authority.²⁹ Furthermore, several of these rules specifically state that such citation is not favored.³⁰ Because these rules permit citation to

26. *E.g.* 4th Cir. R. 36(a) (2000) ("[an opinion] will be published *only if* the opinion satisfies one or more of the standards for publication") (emphasis added); Fed. Cir. R. I.O.P 10.4 (2000) ("The court's *policy is to limit precedent* to dispositions meeting one or more of these criteria . . .") (emphasis added).

27. 4th Cir. R. 36(a) (2000); *see* 7th Cir. R. 53(c) (2000); 9th Cir. R. 36-2 (2000); Fed. Cir. R. I.O.P 10.4 (2000); Colo. App. R. 35(f) (2000).

28. *Anastasoff*, 223 F.3d at 899.

29. *See* 4th Cir. R. 36(c) (2000); 5th Cir. R. 47.5.4 (2000); 6th Cir. R. 28(g) (2000); 10th Cir. R. 36.3 (2000); 11th Cir. R. 36-2 (2000).

30. *E.g.* 10th Cir. R. 36.3 (stating that citation to an unpublished opinion is disfavored, but the opinion may be cited if "(1) it has persuasive value with respect to a material issue

unpublished decisions, courts may use them in making decisions. The controversy arises, however, from the statements in these rules that the unpublished decisions are not binding precedent.³¹

C. Allowing Unpublished Decisions to be Cited and Used as Binding Precedent

The *Anastasoff* case would radically alter the treatment of unpublished decisions in the federal circuit courts.³² Under the *Anastasoff* reasoning, citation would be permitted for all cases. Furthermore, all cases would be equally binding, regardless of their status as published or unpublished. Consequently, *Anastasoff* would alter the courts' existing practice of using the classification of cases as either published precedent or unpublished precedent as a signal to subsequent courts that one case is more persuasive as a precedent than another case.

III. THE ROLE OF UNPUBLISHED DECISIONS

The process of choosing only some cases as precedent and passing over others by designating them as unpublished has long been controversial.³³ Some commentators have criticized

that has not been addressed in a published opinion; and (2) it would assist the court in its disposition"); 4th Cir. R. 36(c) (stating that citation of the court's unpublished dispositions is "disfavored"); 6th Cir. R. 28(g) (stating that citation of the court's unpublished decisions is "disfavored").

31. E.g. 10th Cir. R. 36.3(A) (2000) ("Unpublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel.").

32. Only the Fifth Circuit has a rule that designates certain unpublished decisions as binding precedent: "Unpublished opinions issued before January 1, 1996, are precedent. However, because every opinion believed to have precedential value is published, such an unpublished opinion should normally be cited only when the doctrine of res judicata, collateral estoppel or law of the case is applicable. . . ." 5th Cir. R. 47.5.3 (2000).

33. See *Re Tenth Cir. Rules*, 955 F.2d at 36 (Holloway, C.J., dissenting); see generally David Dunn, Student Author, *Unreported Decisions in the United States Courts of Appeals*, 63 Cornell L. Rev. 128 (1977); William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573 (1981) [hereinafter *An Evaluation of Limited Publication*]; William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167 (1978) [hereinafter *The Non-Precedential Precedent*].

unpublished opinions for creating a body of “secret” law,³⁴ and other commentators have stated that permitting decisions to go unpublished invites sloppy decisions, less judicial accountability, and a lack of uniformity.³⁵

In addition to criticizing the process of designating some opinions as unpublished, some commentators have specifically attacked the rules that restrict citation to unpublished decisions. These rules have been challenged on constitutional grounds such as due process and equal protection.³⁶ The appellate courts have rejected prior challenges and have upheld circuit court rules restricting citation of unpublished decisions. The Supreme Court has declined to address their validity when it has had the opportunity to rule on their constitutionality.³⁷ The *Anastasoff* case is remarkable because, unlike the prior appellate decisions that upheld the circuit court rules on unpublished decisions, it declares one of those rules unconstitutional.³⁸

In his majority opinion in *Anastasoff*, Judge Arnold expanded on an idea that he first raised in a comment he wrote about unpublished opinions approximately a year before.³⁹ Judge Arnold explains that “declar[ing] that unpublished opinions are

34. See, e.g., Carpenter, *supra* n. 3, at 236-237; Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Court of Appeals*, 54 Vand. L. Rev. 71 (2001).

35. Martin, *supra* n. 4, at 180. For additional commentators who have criticized the use of unpublished opinions, see *id.* at 180 n. 11.

36. See generally Dunn, *supra* n. 33, at 141-45.

37. See e.g. *Do-Right Auto Sales v. U.S. Ct. of App. for the Seventh Cir.*, 429 U.S. 917 (1976) (denying leave to file petitions for writs after the Seventh Circuit struck the petitioners' citation of an unpublished decision); *Browder v. Dir., Dept. of Corrections of Ill.*, 434 U.S. 257 (1978). The *Browder* Court did not mention the no-citation question, although it had granted certiorari on the issue; it left “the validity of the Seventh Circuit's ‘unpublished opinion’ rule . . . to another day.” *Id.* at 258-59 n. 1.

38. The *Anastasoff* case held that the Eighth Circuit rule providing that unpublished opinions are not precedent violated Article III of the United States Constitution. *Anastasoff*, 223 F.3d at 899. Ms. Anastasoff's case, seeking a refund for overpaid federal income taxes, might seem inconsequential and mundane at first blush. She argued that her case should not be controlled by an unpublished opinion that the Eighth Circuit had issued eight years before and that one of the attorneys had dredged up out of the archives. This argument was consistent with that of many a litigant before her because 8th Cir. R. 28(A)(i) specifically stated that unpublished decisions were not binding precedent. However, Judge Arnold held that the court was bound by the result in that unpublished decision because it was precedent. *Id.* at 905.

39. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219, 226 (1999).

not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the ‘judicial.’”⁴⁰ He further states that the rule violates the duty of judges under Article III because the judicial power, as contrasted to the legislative power, “is a power only to determine what the law is, not to invent it.”⁴¹

The focus of this article is not the constitutional issues raised by Judge Arnold and other commentators. Instead, this article will focus on why courts should abandon the published v. unpublished terminology, yet still continue the practice of designating some opinions as less persuasive precedents. First, there is no reason to create a secret body of law by keeping some opinions unpublished; electronic databases can make all opinions increasingly available. Second, the judicial process would be significantly slowed if every case were allotted the time now expended on only published opinions. The quality of the reasoning in unpublished decisions is sufficient to meet Constitutional requirements while also satisfying the parties’ needs for efficient resolution of a case. Finally, if attorneys are inundated with all opinions that courts issue every year, it is helpful for them to have a court’s designation of which of these opinions are to be treated as more persuasive.

A. Availability

The unpublished opinion debate is obscured by the focus on whether or not an opinion appears in a book.⁴² The issue is not publication, but instead the weight of a judicial decision. With the increased availability of opinions on electronic databases, the dichotomy between published decisions and unpublished decisions may become moot, at least from the perspective of accessibility.

Many “unpublished” opinions are not truly unpublished; they are available on court websites or private electronic

40. *Anastasoff*, 223 F.3d at 899.

41. *Id.* at 901.

42. “We do not mean to suggest that the Framers expected or intended the publication (in the sense of being printed in a book) of all opinions. For the Framers, limited publication of judicial decisions was the rule. . . .” *Id.* at 903.

databases.⁴³ To understand the role of publication in the discussion of unpublished decisions, it is helpful to note that the earliest legal opinions were almost universally unavailable or unpublished. Now that publication systems have been established, we have moved to the present system of selective availability: Some opinions are published, others are unpublished. However, with improvements in technology, the future may soon make all opinions universally available or published.⁴⁴

When placed in historical context, “limited publication is hardly a radical idea; until recently, case reporting has been a haphazard enterprise.”⁴⁵ In fact, the earliest decisions were not published. In England, it was not until during the period of the Year Books (ca. 1290-1535) that law students first reported judicial sessions they attended.⁴⁶ After the period of the Year Books, private reports of cases began to be published, usually named after some distinguished lawyer or judge.⁴⁷ These reports consisted of a mixture of facts, statements of the judges and counsel, and comments from the reporters.⁴⁸ They were notoriously unreliable.⁴⁹

Similarly, the reporting of judicial opinions in the early years of the United States was sporadic. There were no official reporters of decisions and only a few private reporters.⁵⁰ Most states did not establish their own reporter systems until the

43. All the federal appellate court opinions and many state court opinions are public record. Martin, *supra* n. 4, at 185. In addition, some of the circuits, such as the Sixth Circuit, publish all of their decisions on their websites, and many of the unpublished opinions are regularly available on Westlaw and LEXIS. *Id.*

44. Almost every federal court and state supreme court now provides some of its opinions on websites, although most only provide recent opinions. Several appellate court opinions also are available on these websites. For an up-to-date listing and links, see <<http://www.law.cornell.edu/index.html>> (accessed May 29, 2001).

45. Reynolds & Richman, *An Evaluation of Limited Publication*, *supra* n. 33, at 575.

46. Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 Emory L.J. 437, 445 (1996).

47. *Id.* at 446.

48. *Id.*

49. *Id.*

50. See generally *The Bluebook: A Uniform System of Citation* 188-241, Table T.1 (Columbia L. Rev. et al. eds., 17th ed. 2000). The official United States Reports were not published until 1893. *Id.* at 183; see Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 Am. J. Leg. History 28, 34 (1959) (cited in Anastasoff, 223 F.3d at 903).

1880s.⁵¹ Between 1875 and 1900, West Publishing Company and Lawyer Cooperative Publishing first established comprehensive nationwide reporter systems.⁵²

As caseloads burgeoned, courts struggled to keep up. Before 1964, nearly all federal opinions were published. Then, the Judicial Conference recommended “[t]hat the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value.”⁵³ The movement toward selective publication began in earnest in the early 1970s when the Federal Judicial Center recommended standards for publication.⁵⁴ The Federal Judicial Center’s model rule stated that an opinion shall not be designated for publication unless it meets one of the listed criteria.⁵⁵ Furthermore, the model rule specifically prohibited citation of opinions not designated for publication.⁵⁶

One impetus behind restricting citation of the unpublished decisions was the argument that it was unfair for one party to have access to authority that another party did not have. Publication assured a relatively level playing field. Many of the rules on unpublished decisions now address the issue of availability, at least among the litigants. They require that a party citing an unpublished authority attach that authority to any document citing it.⁵⁷ This makes the opinion available equally to all parties and to the court.

These rules do not, however, address the issue of one party’s having access to a bank of unpublished opinions. For

51. Some states have abandoned their official volumes for state opinions and now rely exclusively on West Publishing for the official reports of their opinions.

52. Nancy P. Johnson, Robert C. Berring & Thomas A. Woxland, *Winning Research Skills* 2 (rev. 4th ed., West 2000). It is interesting to note that Lawyers Cooperative Publishing focused more on selective publication of cases valuable as precedents much like the courts’ designations of some opinions as “published.”

53. Judicial Conf. of U.S., *Reports of the Proceedings of the Judicial Conference of the United States* 11 (1964).

54. See generally *Standards for Publication of Judicial Opinions: A Report of the Committee on Use of Appellate Court Energies of the Advisory Council for Appellate Justice* 1-21 (1973).

55. *Id.* at 22 (citing The Model Rule on Publication of Judicial Opinions).

56. *Id.* at 23 (“Opinions marked, Not Designated for Publication, shall not be cited as precedent by any court or in any brief or other materials presented to any court”).

57. See e.g. 5th Cir. R. 47.5.3 (“A copy of any unpublished opinion cited in any document being submitted to the court must be attached to each copy of the document.”).

example, many federal and state governmental litigants have access to prior cases argued by their departments. If all past “unpublished” decisions were deemed binding on the court, the governmental litigant would have the advantage—an unrestrained choice about which unpublished cases to cite and which to ignore. Although the court and other parties would have the copy of the unpublished opinion attached to the brief, they would not have ready access to the unpublished opinion database to check whether the attached opinion was consistent with other opinions or an anomaly.

Prior commentators have argued that permitting citation will make unpublished opinions more accessible to the uninitiated lawyers by alerting them to the existence of a relevant case.⁵⁸ In response to the concerns about access to the entire database, some suggest opinions could be made available by preparing rudimentary indexes and distributing them to libraries and law schools.⁵⁹ In addition, more and more courts are now making their opinions available in electronic form. If publishers are granted access to these opinions, they could easily post all of the opinions on their electronic databases. Yet these private services, such as Westlaw and LEXIS, may be too costly for some practitioners. The Internet may be the ultimate answer to the accessibility arguments. When a court web site is available, all opinions—both those designated for publication and those not designated for publication—could be posted there for easy access by all of the public. If publication is removed from the equation, the debate can then focus on the real issue—the value of each opinion as precedent.

B. Quality of Reasoning

Last year, the Colorado Court of Appeals issued approximately five times as many unpublished opinions as it issued published opinions.⁶⁰ If the court devoted the same

58. Reynolds & Richman, *The Non-Precedential Precedent*, *supra* n. 33, at 1199.

59. *Re Tenth Cir. Rules*, 955 F.2d at 37-38 (Holloway, C.J., dissenting).

60. In 2000, the Colorado Court of Appeals issued 291 published opinions and 1432 unpublished decisions. Colo. Jud. Branch, *FY 2000 Annual Report* at 18 <<http://www.courts.state.co.us/annualrpt/annual2000/table10.pdf>> (accessed May 11, 2001).

amount of time to unpublished opinions as it allotted to published opinions, cases might backlog for years.⁶¹ Because the majority of decisions handled by intermediate appellate courts are fairly routine and deal with the correction of error, they do little to declare or forward the law.⁶² Thus, the system is best served by giving these cases more speedy and summary treatment. Although some courts have moved to summary opinions that merely state a conclusion, unpublished decisions are better because they efficiently resolve a controversy, while still providing litigants with some reasoning for the result.

Judges satisfy their Article III judicial duties when they provide fair and consistent decisions along with analysis and reasoning. Some unpublished opinions may be summary or per curiam opinions that merely state an outcome without reasoning; these summary dispositions are not the focus of this article. Instead, the focus here is on those opinions that judges prepared yet determined did not warrant publication according to the criteria laid out in the rules.

Some argue that unpublished opinions are “dreadful in quality.”⁶³ Because the judges and their support staff spend less time on these opinions, they may not be “the literary models that [the courts] would like to produce as opinions.”⁶⁴ However, most judges take their work seriously and make every effort to ensure that the outcome is both fair and timely for the litigants and that the reasoning satisfies the requirements of Article III for judicial deliberation.⁶⁵

To get an idea of the effort put into an unpublished decision, here is a description of how opinions are processed at the Colorado Court of Appeals. Each morning when I arrived at my office as the Reporter of Decisions for the Colorado Court of

61. Another option might be for the legislature to appropriate funds for additional judges and court personnel.

62. Jerome I. Braun, *Eighth Circuit Decision Intensifies Debate over Publication and Citation of Appellate Opinions*, 84 *Judicature* 90, 91 (2000).

63. William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 *Cornell L. Rev.* 273, 284 (1996).

64. *Re Tenth Cir. Rules*, 955 F.2d at 38 (Holloway, C.J., dissenting).

65. Some of the unpublished opinions contain lengthy explanations of the court's analysis. See e.g. *Rodriguez v. Healthone*, 2000 WL 674860 (Colo. App. May 25, 2000), modified on denial of rehearing (Colo. App. Aug. 24, 2000) (not selected for official publication).

Appeals, I glanced at my in-box. Usually the box was stacked high with green papers. These papers were the “greens”—drafts of opinions with a cover sheet printed on green paper. The “greens” were opinions that the court planned to issue only to the parties. They were not designated for official publication.

Before reaching my in-box, the “greens” had undergone significant scrutiny. First, each case was assigned to a three-judge panel of the Colorado Court of Appeals. This panel initially determined that the case might be one that could be resolved fairly simply. One of the three judges had the primary responsibility for the case, and that judge worked with a staff attorney or judicial clerk to review the record and to prepare an initial draft of the opinion. This initial draft was called the Predisposition Memo, and all three judges on the panel reviewed this preliminary opinion. If the parties had requested oral argument, the judges heard the argument and afterwards voted on a final disposition of the case. If they agreed with the result and the analysis in the Predisposition Memo, that memo would become a “green.” If two of the three judges did not agree with the Predisposition Memo, the original “green” might become the dissent, and another opinion was prepared. The “greens” were then distributed to the majority of the judges on the Court of Appeals to read.⁶⁶ At the same time, a copy of this “green” opinion was sent to me as the Reporter of Decisions for a final review before it was mailed to the parties.

Approximately 83% of the over 1,700 opinions issued by the Colorado Court of Appeals in fiscal year 2000 came through this “greens” process. The remaining 291 cases received different treatment because they were to become published opinions. When any one judge on a three-judge panel assigned to a case believes that the case may be one that should be published, the preliminary opinion is then distributed with a cover sheet on pink paper, instead of green, and becomes what court personnel call a “pink.”⁶⁷ If a “pink” remains slated for

66. Any judge can ask the full court to reconsider the status of a “green” case as unpublished, and if a majority of the judges agree that it should be published, the case switches to the published opinion track. See also James S. Casebolt, *Procedures and Policies of the Colorado Court of Appeals*, 24 Colo. Law. 2105 (1995).

67. There are a few other situations that generate “pinks.” For example, anytime there is a dispute among the three judges on a panel, the opinion is first distributed as a pink so

publication, it is edited and then circulated to all sixteen judges on the court of appeals with a blue cover sheet, so it is called a “blue.”⁶⁸

The cover sheet that circulates with the “blues” asks each judge to vote on the opinion’s publication status. If the majority of the judges on the court check the line that recommends the opinion should not be published, that opinion converts to a “green” and continues through the same process as other unpublished decisions. If, however, the majority of the judges casts a vote in favor of publication, the “blue” is again distributed to all of the judges before publication. Sometimes, if there is debate about the reasoning or the result, all of the judges will discuss and vote on the opinion in full court conference to determine whether or not it should be published. If there are revisions, an additional “blue” is circulated for review and comment from the other judges. The Reporter of Decisions reviews these opinions each time—once for unpublished “greens” and three or more times for a published opinion.

This system guarantees that even the unpublished “green” opinions are carefully reasoned. The process works now because less than twenty percent of the opinions are slated for publication. However, if every decision issued by the court took the time to pass through the full procedure used for published decisions, the court’s ability to process opinions would be reduced dramatically. Either additional judges would have to be added to the court or else a backlog of cases would build up. If litigants are satisfied with the efficiency of the process that is now in place and the quality of the decisions they have received, then dictating that each opinion receive equal time makes no sense.

the Reporter of Decisions and other judges on the panel will have the opportunity to review the written analysis of the opinion an additional time.

68. Colo. App. R. 35(f) was amended effective Jan. 1, 1984. Prior to this amendment, the determination of which decisions were to be published was made by the Chief Justice of the Colorado Supreme Court, the Chief Judge of the Colorado Court of Appeals, and the Reporter of Decisions for the Colorado Supreme Court.

C. Treatment of Unpublished Opinions as Precedent

If all judicial opinions become available, litigants will be inundated with information, and it will be costly and difficult to sift more persuasive precedents from the chaff. Judges, who deal with the cases on a daily basis, and therefore, are best schooled in determining which cases might be more influential for subsequent decisions, should continue to help litigants by designating some cases as weaker precedent (“unpublished” or a comparable term) and some as stronger. Nothing in the Constitution prohibits judges from providing this guidance.

If all judicial opinions are published, litigants will be staggered by the research load. As early as 1671, an English jurist wrote that the body of cases was “as the rolling of a snowball, it increaseth in bulk in every age, until it becomes utterly unmanageable.”⁶⁹ The Federal Reporter increases now at 30 volumes per year⁷⁰ and probably would be over 100 volumes per year if unpublished decisions also were included.

When the federal courts first designated some opinions as unpublished, the debate focused on the corresponding court rules that prohibited their citation. If unpublished opinions are readily available and now, according to more courts’ rules, may be cited, the debate shifts to the precedential weight of unpublished decisions.

Anastasoff is correct in holding that unpublished opinions are precedent.⁷¹ Other courts have expressed the same position that “all rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation.”⁷² However, the conclusion that unpublished decisions are precedent can be reconciled with the court rules that describe them as only persuasive authority if we review the historical meaning of precedent.

In the common law system, the law was established by “an

69. Braun, *supra* n. 62, at 91.

70. *Id.*

71. *Anastasoff*, 223 F.3d at 905.

72. *Re Tenth Cir. Rules*, 955 F.2d at 37 (Holloway, C.J., dissenting) (citing *Jones v. Superintendent, Va. St. Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972)).

infinite number of Grave and Learned Men,”⁷³ i.e., the judges who created the law through a long line of individual cases. Even in many code systems, the law recognizes and acknowledges the importance of prior decisions to interpret that code.⁷⁴ Through precedent, “the past is, for lawyers and judges, a repository not just of information but of value, with the power to confer legitimacy on actions in the present.”⁷⁵

There is a distinction, however, between conferring legitimacy and being completely bound. In this way, the concept of precedent is distinguishable from the doctrine of *stare decisis*, which first emerged in the nineteenth century.⁷⁶ *Stare decisis* is Latin for “to stand by things decided.”⁷⁷ Black’s defines it as “[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.”⁷⁸

Although *stare decisis* incorporates the use of precedent, the traditional concept of precedent is distinctive and predates the doctrine of *stare decisis*. “Precedent” comes from the Latin “*praecedent*” meaning “going before.”⁷⁹ Traditionally, “precedent” meant simply that the case was decided before another. The Black’s definition reflects this historical meaning: “Precedent” means “[a] decided case that furnishes a basis for determining later cases involving similar facts or issues.”⁸⁰

73. Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* 55 (Joseph Cropsey ed., U. Chi. Press 1971).

74. Rudolf B Schlesinger, Hans W. Baade, Mirjan R. Damaska & Peter E. Herzog, *Comparative Law* 643-51 (5th ed. 1988) (comparing the role of precedent in code and common law systems).

75. Anthony T. Kronman, *Precedent and Tradition*, 99 Yale L.J. 1029, 1032-33 (1990).

76. Berman & Reid, *supra* n. 46, at 449.

77. *Black’s Law Dictionary* 1414 (Bryan A. Garner ed., West 1999).

78. *Id.*

79. *The Random House Dictionary of the English Language: The Unabridged Edition* 1130 (Jess Stein & Laurence Urdang eds., Random House 1971).

80. *Black’s Law Dictionary*, *supra* n. 77, at 1195. It is beyond the scope of this article to discuss in depth all of the normative presumptions necessary for applying this definition of precedent. For example, it assumes that a later case could involve similar facts and issues, but some cultures would reject this assumption because for them every situation is unique. Some systems distinguish between using precedent for similar issues and using it only for similar fact situations. Furthermore, facts or issues of a case must be reduced to a certain level of abstraction to provide an analytic framework to compare them with the facts or issues in another situation. Whenever we characterize a fact or issue as similar, we

The broad concept of precedent should not be reduced to the narrow doctrine of stare decisis. The decision in *Anastasoff* seems to refer to the concepts interchangeably and to presume both are immutable.⁸¹ Yet, precedent has been an evolving and dynamic doctrine. None of the Western European legal systems prior to the seventeenth century “established that judicial decisions have normative force as a source of law.”⁸² Before that time, selected judicial decisions were used to illustrate what the law ought to be,⁸³ and were used “to illustrate legal principles, but were not themselves an authoritative source of law.”⁸⁴ In the early seventeenth century, the concept that the courts should follow previously enunciated rules arose, but the cases still served only as examples of the rules.⁸⁵ The governing thought was still that a line of earlier cases illustrated judicial custom, and this custom, rather than the individual cases, was something that should not be overturned without good reason.⁸⁶

When Blackstone opened the first course on English law in 1753, he based his method not on English law itself, but instead on theories of philosophy, theology, and the natural sciences that tested truth by conventions of the past.⁸⁷ Thus stare decisis arose from the concept that for our legal system to be fair, each future decision should be consistent with each individual case that came before it.

Yet, from the perspective of precedent, all cases are not equal. Some may raise intriguing issues that have a profound impact on the future. Others are more mundane and “add essentially nothing to the corpus of law.”⁸⁸ American jurists recognized the central role that precedent should play in judicial decisions, but never required absolute adherence to it.⁸⁹ By

are making certain assumptions about what is analogous or we are emphasizing certain characteristics that others could find distinguishable. *Id.* at 1195.

81. *Anastasoff*, 223 F.3d at 903-04.

82. Rebecca Redwood French, *The Golden Yoke* 145 (1995).

83. Berman & Reid, *supra* n. 46, at 444-45.

84. Theodore F.T. Plunkett, *A Concise History of the Common Law* 260 (5th ed., Little, Brown & Co. 1956).

85. Berman & Reid, Jr., *supra* n. 46, at 445.

86. This concept was introduced by Sir Edward Coke. *Id.* at 446-47.

87. *Id.* at 449. See also William Blackstone, *Commentaries* vol. 1, 69-70.

88. Martin, *supra* n. 4, at 178.

89. Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), in *The Mind*

designating some cases as published and others as unpublished, the judges themselves are attempting to predict which cases will have future significance. The pressure to cite unpublished opinions indicates that some practitioners disagree with the court's determination.⁹⁰ Yet, because the judges themselves have a keen sense of what kinds of cases have come before them in the past, they are probably best equipped to determine which cases are exceptional.

If either published or unpublished decisions may be cited, then either can be used as precedent to furnish a basis for determining later cases. The rules that permit a court to indicate which decisions are more likely to be significant can simply provide guidance for future panels reviewing a similar issue.

The designation by the court of some cases as "published"—ones that might provide a more valuable guide for future cases—and others as "unpublished," or less valuable, more closely follows the pre-Blackstone concept of precedent. The decisions that are published serve the same role as the exemplary cases in earlier reporting systems, some of which have endured until today. These earlier reporter systems published only lead cases as models of what the law ought to be and commented on them. Unpublished decisions also may be cited because the courts "cannot deny litigants and the bar the right to urge upon [them] what [they] have previously done."⁹¹ However, the courts should attempt to follow a body of law instead of being slavishly tied to follow the result in each individual case that came before.

As Oliver Wendell Holmes stated: "It is revolting to have no better reason for a rule of law than that so it was laid down in

of the Founder: *Sources of the Political Thought of James Madison* 391 (Marvin Meyers ed., rev. ed. U. Press of New Eng. 1981); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand. L. Rev. 647, 662-66 (1999), cited in Note, *Constitutional Law—Article III Judicial Power—Eighth Circuit Holds That Unpublished Opinions Must Be Accorded Precedential Effect—Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), 114 Harv. L. Rev. 940, 943 n. 32 (2001).

90. Sometimes the judges miss the mark or there would not be any demand for unpublished decisions. Obviously, the pressure to cite to unpublished decisions comes because someone thinks the case is significant. See Gideon Kanner, *The Unpublished Appellate Opinion: Friend or Foe?* 48 Cal. St. B.J. 386, 446 n. 75 (1973).

91. *Jones v. Superintendent, Va. State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972).

the time of Henry IV.”⁹² Holmes found strict adherence to precedent “an indefensible practice.”⁹³ According to Holmes, past cases may “throw ‘light’ upon the present by helping us to understand the quirky path by which we have arrived at our current situation.”⁹⁴ Yet, the doctrine of precedent should not be narrowly construed as requiring that “the mere fact that the law once had a certain content” is reason “for continuing to preserve it in that form.”⁹⁵

CONCLUSION

Improved technology may make published and unpublished opinions equally accessible. However, courts and litigants should continue to recognize that there are two tiers of opinions—some more valuable as precedents and others less valuable. Consequently, the present system of designating some opinions as “unpublished” and yet allowing for their citation is both efficient and appropriate. Most parties seek primarily a resolution of their case based on some reviewable reasoning. The majority are not concerned with creating new law and are happy with the degree of judicial scrutiny their case receives.

In contrast, some decisions do have the potential to play a more significant role in shaping future decisions. Courts should be permitted to spend additional time in producing these decisions. Likewise future courts should have the option of weighing their significance more heavily when determining how they should be applied as precedent.

92. Oliver Wendell Holmes, *The Path of the Law*, in *Collected Legal Papers* 167, 187 (Peter Smith 1952).

93. Kronman, *supra* n. 75, at 1035.

94. *Id.*

95. *Id.*